

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-20889

To Be Argued By
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JOSEPH WILSON, t/n HOWARD BURTON, :

Petitioner-Appellant. :

-against- :

WALTER FOGG, Superintendent, Green Haven :
Correctional Facility, :

Respondent-Appellee. :
-----X

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

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STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Owen, J.) entered June 17, 1977, denying, without a hearing, petitioner-appellant's (hereinafter "petitioner") application for a writ of habeas corpus. The District Court granted a certificate of probable cause on July 11, 1977.

Questions Presented

1. Was petitioner properly convicted in absentia because he voluntarily refused to attend his trial?
2. Did the trial court properly not order a competency examination prior to trial?

Statement of Facts

Petitioner was convicted of burglary and robbery after a jury trial in Supreme Court, New York County, in December, 1972 (Spector, J). Petitioner is presently incarcerated in the Green Haven Correctional Facility as a result of his conviction. Petitioner was sentenced to five to fifteen years for burglary and two and one third to seven years for robbery.

Petitioner refused to attend his trial. The Appellate Division, First Department, affirmed petitioner's conviction without opinion. 51 A D 2d 1105 (1976). Leave to appeal to the Court of Appeals was denied April 31, 1976. 39 N Y 2d 842 (1970).

On August 11, 1972, the petitioner entered Mrs. Margaret Geary's Manhattan apartment and robbed her of five dollars. Mrs. Geary saw the petitioner for from ten to fifteen minutes (T. 56, 67).*

*Page references preceeded by "T" are to the trial transcript, a copy of which is being provided to the Court herewith.

light was on in the apartment, and during the rest of the time the room was at least partly lit by a light outside the windows (T. 29, 36-37, 49-58, 63). For part of the incident, petitioner was actually in bed with the victim, who was making a deliberate effort to get a good look at him (T. 35, 63). It is apparent that Mrs. Geary was able to make a positive identification of the petitioner as her assailant.

Furthermore, Officers McLelland and Farrell saw petitioner dressed as Mrs. Geary had described, in the vicinity of the crime shortly after Mrs. Geary called the police (T. 118; 77-78, 91, 96-97). When apprehended, petitioner was apparently attempting to conceal himself behind a parked car (T. 119). Petitioner had a five dollar bill when he was arrested, which had obviously been put into his pocket separately from his own folded money (T. 84, 87; 120-121). The man who burglarized Mrs. Geary's apartment had stolen a five dollar bill from her.

The District Court (Owen, J.) exhaustively reviewed the record and the law and dismissed the writ (A. 5-19).* The Court stated, in relevant part:

*Page references preceeded by A are to appellant's appendix.

"The court record reveals that as the trial on his indictment neared, petitioner began what, in the context of the complete record, can only be regarded as an attempt at disrupting the processes of justice, by one means or another. The first occurrence was some time prior to November 2, 1972, when petitioner moved to relieve his then attorney, Milton Adler, Esq., of the Legal Aid Society, an experienced trial lawyer, when Mr. Adler announced to the Court that he was ready to try the case. A new lawyer from the Appellate Division panel was appointed to defend petitioner, one Alexander Dreiband, Esq.

"On November 2, 1972, Mr. Dreiband requested and received a month's adjournment to prepare the case. When the District Attorney moved the case for trial on December 4, 1972, according to him, 'the defendant started carrying on,' and petitioner's own lawyer acknowledged three days later, the day the trial started:

'[T]he last time we were in court [three days ago] he [petitioner] vented his anger upon Mr. Justice Warner and upon the court attendants. His scene in the courtroom was one where when the court attendant put his hand on his arm he started to scream and yell, 'Don't you touch me.' This was in the courtroom. As a result of which Mr. Justice Warner got up and walked out of the courtroom while they were returning the defendant to his cell.'

"The case was scheduled for trial on December 7, 1972, before Mr. Justice Spector, who was sitting in the New York City Civil Court Building.⁽³⁾ The first recorded minutes for proceedings that day read as follows:

MR. HELLER [Assistant District Attorney]: Justice Spector, pursuant to your instructions⁽⁴⁾ Mr. Dreiband, myself, the Clerk of the Court and the stenographer went to the Manhattan House of Detention at 125 White Street [across the street] about a half hour ago to see the defendant in this case, Joseph Wilson, who still refuses to come to court. According to my Correction captain, Wilson refuses to come downstairs to the conference room to speak with us, and refuses to see anyone connected with this case.

We have two alternatives in this case, either to try him in absentia or for your Honor to sign an order to produce him using reasonable and necessary force to bring him into the courtroom. I think if we do nothing and just adjourn the case it would set a very dangerous precedent in this county and perhaps in other counties with other prisoners.

- (3) That building has no segregated corridors for moving prisoners and necessitates moving all persons to and from courtrooms in the public corridors.
- (4) Unfortunately, those instructions appear to be unrecorded as are the pretrial proceedings on Nov. 2, Dec. 4, Dec. 6, and Dec. 7, prior to the suppression hearing.

"Thereupon, petitioner's counsel suggested to the Court that his client was not in possession of his faculties and urged the Court to determine whether there should be a mental examination. Justice Spector ultimately rejected the suggestion, but the response of the Assistant District Attorney to the Court's invitation for comment is illuminative on the question that is before me:

MR. HELLER: No judge. I think this is -- we are dealing with a malingerer here, with a man who is always lucid in court. He was represented by Milton Adler. When Mr. Adler said that he was ready to try the case he moved to relieve Mr. Adler and have Appellate Division attorney assigned. The last time the case was on November 2nd, before Justice Silverman, Mr. Dreiband was there and Mr. Dreiband requested a month's adjournment to properly prepare the case. At that time the defendant was perfectly lucid in court. As soon as I moved the case for trial on December 4th the defendant started carrying on. I think this is just an attempt to avoid what to him would be a very unpleasant experience, being tried for this particularly vicious and heinous crime. I think he is a malingerer and I think we should proceed.

"Petitioner's counsel did not disagree with any of the foregoing statements by the Assistant District Attorney, except as to whether petitioner and counsel had been in court together on November 2, 1972.

"The colloquy thereafter between the Court and all counsel went on as follows:

THE COURT [to petitioner's lawyer]:
Well, he would not consult with you
this morning or with the assistant
d.a.

MR. DREIBAND: Well, he wouldn't come
downstairs. I didn't go up and I
didn't appear to see him as counsel,
but the warden, the assistant warden,
went upstairs and he told the assistant
warden it was his holiday, and he
wouldn't come down.

Is that correct?

MR. HELLER: Yes. He told him he refuses
to speak with anyone.

MR. DREIBAND: But he also mentioned
something.

MR. HELLER: About his holiday.

MR. DREIBAND: At least that is what the
warden stated.

MR. HELLER: In response to that as to
whether or not it's his religious holiday,
I yesterday subpoenaed the pedigree sheet
of the defendant when he was originally

incarcerated on this charge in the Manhattan House of Detention. At that time he gave his religion as Protestant. I understand he now claims that he is now a Muslim and it's his holiday. I don't know of any holiday that is today or yesterday or the day before.

THE COURT: They told me yesterday that it was Chanukah and that it was his holiday. I am quite observant myself, and I don't know of anybody, Jew or otherwise, who doesn't work during the Chanukah festival.

MR. DREIBAND: The fact that we are here today --

THE COURT: I think that this defendant has an opportunity to come in to court to try his case. He was notified this morning that the district attorney and his counsel were present, they wanted to discuss his appearance in court today and informed him that the judge had instructed them that he appear in court today, and he has chosen not to appear. So, I think we will proceed without him.

"A suppression hearing followed and, after recess, in the afternoon, the jury was selected by counsel in the absence of petitioner. At the close of the selection, the Court ruled:

THE COURT: The defendant will be directed to show up here tomorrow morning. The defendant will be directed to show up here tomorrow morning at 10:00 o'clock.

"The record of the next morning reveals the following:

MR. DREIBAND: May I for the record state, your Honor, that the defendant has come to court this morning without any difficulty. That I spoke with him and that he has advised me that he wants me to continue trying the case in his behalf, although he had previously instructed me not to.

THE COURT: Well, we are very happy to have you here, sir, and the defendant here.

MR. DREIBAND: Yes, so am I.

Your Honor, I just went upstairs with the attendants in court and advised the defendant that under the rules and regulations of the Correction Department he had to be handcuffed to be brought down to court. I would [not] use the language he used but he said it is in violation of his constitutional rights, he refuses to be handcuffed to be brought to court and the last remark he made as I walked away was, 'You are not my lawyer any more.'

Now I will be guided by what your Honor directs me to do.

THE COURT: Well, I direct that we proceed without him, since he has been invited to come here and he chooses not to. We can't change the rules and regulations of the Correction Department to suit him. We will proceed with the trial.

"Petitioner remained absent throughout the trial and was found guilty by the jury as charged. After trial, but before sentence, Mr. Dreiband died. At sentence on March 15, 1973, petitioner was represented by new assigned counsel, Mr. Geller. Geller advised the court that petitioner told him that his relationship with Dreiband had been a poor one and that Dreiband had not told him, petitioner, that there was a trial or that it would proceed without him. Geller asked that a hearing be held on the question of waiver of the right to be present at trial and the Court denied the application with the words, 'Your client is not only a burglar and a thief, but he's a liar.' The Court then reviewed the prior proceedings. Justice Spector stated, inter alia, '[P]etitioner was advised of every proceeding and every move made in this trial,' and observed that petitioner had refused to attend the sentencing when it was scheduled a few weeks earlier and that he had 'directed the Department of Correction to use whatever force is necessary, whatever means was necessary to bring him to court.' Petitioner, through Geller, denied all knowledge that a trial was in progress and particularly that Dreiband or any assistant district attorney so informed him, and prior to imposition of sentence himself stated, 'As far as Mr. Dreiband telling me about a hearing and a trial, that's incorrect.'"

The court then continued to find that petitioner had effectively, knowingly and voluntarily waived his right to be present during his trial as "the result of his deliberate decision not to appear despite continued orders and invitations by the Court." (A. 14).

The court found that:

"What clearly emerges is the picture of a 'street-wise' individual who in a misguided but ultimately ineffective way, endeavored to avoid the inexorable day of reckoning. His comments, such as '[y]ou are not my lawyer anymore,' coupled with his refusal to come to court himself, obviously showed a belief on his part that if he did not have a lawyer and was not present, then the case could not be tried. His outbursts, three days before the beginning of the trial, viewed against earlier days of appropriate decorum, showed a willingness to use disruptive tactics to cause judicial concern as to his very presence in the courtroom and how to guard him and maintain general decorum, with the hope of gaining the advantage of time and delay.

"I have no question from the record that petitioner knew with clarity the increasing imminence of his trial for he discharged his first lawyer when that lawyer was ready for trial, and on December 4, began the disruptive tactics requiring his removal from the courtroom when the Assistant District Attorney in his presence moved the case for trial. This was but three days prior to its actual commencement. He refused to come to the courtroom the day of the suppression hearing and the beginning of the trial although ordered to do so by the judge, told his lawyer to continue the trial the following day, although remaining absent, later countermanding that to discharge his lawyer. He was incarcerated as a Protestant, subsequently claimed he was a Muslim, but asserted that the reason he would not come to court on December 7, the first day of his trial, was that it was his holiday, Chanukah."

* * *

"The minutes reveal that in the petitioner's presence the Assistant District Attorney moved the case for trial on December 4, which is the day petitioner 'vented his anger upon Mr. Justice Warner and upon the court attendants' with his screaming and yelling. It is

equally clear that the defendant was ordered to come to court the morning of his trial and refused to do so, telling the assistant warden it was 'his holiday' and he would not come down.(6)

"The following day, petitioner's own lawyer reported to Justice Spector that petitioner had come to court that morning without difficulty and that he had spoken with petitioner who 'advised me that he wants me to continue trying the case in his behalf' (Emphasis supplied). The clear import of this statement is not only that Mr. Dreiband was to continue with the trial as defendant's lawyer(7)but, assuming (as one is entitled to assume from a representation to the Court by a client's own lawyer) that the conversation was accurately reported by his lawyer, petitioner, by asking his lawyer to 'continue trying' the case, was expressing an awareness of the fact that it was his trial that was under way with Mr. Dreiband trying it for him. Thus, Justice Spector was clearly entitled to reject

(6) Although petitioner's reported response to the Court's direction to attend is hearsay -- being the out-of-court statement of the assistant warden [a responsible person official] to defense counsel and the assistant district attorney -- that statement has sufficient indicia of reliability since petitioner's attorney was both present at the time the statement was made and present to defend his client's interests in the event there was an inaccuracy in reporting the statement to the Court.

(7) Although this was revoked shortly thereafter. See p. 7 supra

petitioner's statement made at the time of sentence that:
'As far as Mr. Dreiband telling me about a hearing and a trial, that's incorrect. I know nothing about it.'

* * *

"Obviously, a court cannot allow a defendant by disruption or evasive conduct to dictate the date or circumstances under which a trial will take place, particularly in this time of crowded metropolitan dockets and the difficulties of rescheduling police and lay witnesses and keeping them available in the face of delays. Moreover, when a defendant, as his own lawyer admits, has been disruptive before another judge three days before trial, requiring removal from the courtroom, a trial judge is not required in my opinion, to forcibly bring a defendant through public corridors of litigants and lawyers for the sole purpose of putting on the record the defendant's statement of position out of his own mouth when his position is perfectly clear from everything else in the record, including his own statements to a responsible correction officer."

POINT I

PETITIONER WAS PROPERLY
CONVICTED IN ABSENTIA
BECAUSE HE VOLUNTARILY
REFUSED TO ATTEND HIS TRIAL.

1. Petitioner had "notice" a trial was under way.

There is no question that petitioner knew his trial was under way. Mr. Dreiband, petitioner's counsel, on December 7, 1972, at the pretrial hearing, informed the court that petitioner had informed him "that he doesn't want me to try his case, he will try it himself, he will be counsel on the trial." (A. 23-24).

The following day Mr. Dreiband advised the court that petitioner "has advised me that he wants me to continue trying the case in his behalf, although he previously instructed me not to." (A. 39).

Similarly, in the sentencing proceeding Justice Spector stated that trial counsel told him that he had kept him (petitioner) informed of the proceedings against him. (A. 44-51).*

*Petitioner presents no cogent reason why this court should believe petitioner's counsel at sentencing, after he was convicted and no longer had any reason to disrupt the proceedings, but not his counsel at trial.

As the District Court found there are many facts from which notice of trial could be inferred. The charge that Justice Spector consciously attempted to conceal from petitioner the fact a trial was progressing is also false since Justice Spector on more than several occasions ordered petitioner to appear or sent emissaries to visit him. All orders and emissaries were ignored. (A. 22, 27-28, 38). It follows that Justice Spector was quite correct in telling the prospective jurors that petitioner chose not to be present.

2. Petitioner voluntarily refused to attend his trial.

The record is clear that petitioner voluntarily refused to attend the criminal proceedings against him. On the morning of the pretrial hearing, December 7, 1972, Justice Spector ordered the assistant district attorney Mr. Heller and Mr. Dreiband and a stenographer to visit petitioner. According to both Mr. Heller and Mr. Dreiband the correction officials indicated that petitioner refused to come down.* (A. 22, 24-26).

*This was not the first time petitioner had shown a reluctance to participate in criminal proceedings. According to the Assistant District Attorney, the Legal Aid Society had previously represented petitioner. When the Society declared it was ready for trial petitioner moved to have Legal Aid relieved. (A. 24) He had also caused a commotion in court some days earlier with Mr. Justice Warner (A. 26).

Apparently petitioner did not want to come down because he was a Muslim and it was a religious holiday. (A. 26-27). However, according to Heller petitioner's pedigree sheet showed he was Protestant. Petitioner had also indicated that he observed Chanukah. (A. 27).

The jury was selected that afternoon. At the close of the day Justice Spector ordered petitioner produced in the morning. (A. 38).

The following day petitioner decided to come to court. (A. 39). However, when advised that he must make the transit from cell to courtroom in handcuffs, he refused to be brought to court on the grounds that such a transit violated his "constitutional rights." He then told Dreiband "You are not my lawyer any more." (A. 40).

The handcuff rule was a correction regulation requiring use of handcuffs when transporting prisoners through public hallways. (A. 39).

It is well settled that a defendant may be tried in absentia if he voluntarily waives his right to be present. Drope v. Missouri, 420 U.S. 162 (1975); Taylor v. United States, 414 U.S. 17 (1973); Illinois v. Allen, 397 U.S. 337, 342-343 (1970); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Diaz v. United States, 223 U.S. 442, 455 (1912); United States v. Tortora, 464 F. 2d 1202 (2d Cir. cert den. sub nom. Santoro v. United States, 409 U.S. 1063 (1972)).

The law was succinctly stated by this Court in United States v. Pastor, 557 F. 2d 930 (2d Cir. 1977):

"It is settled beyond dispute that an accused has a constitutional right to be present at all stages of his trial, Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed. 2d 174 (1973), F.R.Cr.P. 43(a), including the empaneling of the jury, United States v. Toliver, 541 F. 2d 958 (2d Cir. 1976); United States v. Crutcher, 405 F. 2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed. 2d 219 (1969). However, it is equally well settled that the defendant may waive this right by voluntarily and deliberately absenting himself from the trial without good cause, United States v. Tortora, 464 F. 2d 1202 (2d Cir. 1972), cert. denied,

409 U.S. 1063, 93 S.Ct. 554, 34 L.Ed. 2d 516 (1972); United States v. Taylor, 478 F. 2d 689 (1st Cir.), affd. 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed. 2d 174 (1973); United States v. Miller, 463 F. 2d 600 (1st Cir.), cert. denied, 409 U.S. 956, 93 S.Ct. 300 34 L.Ed. 2d 225 (1972); United States v. Marotta, 518 F. 2d 681, 684 (9th Cir., 1975); Government of Virgin Islands v. Brown, 507 F. 2d 186, 188-90 (3d Cir. 1975); see Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970), either before or during trial, United States v. Peterson, 524 F. 2d 167, 183-86 (4th Cir. 1975), cert. denied, 423 U.S. 1088, 96 S.Ct. 881, 47 L.Ed. 2d 99 (1976).

'A defendant who deliberately fails to appear in court does so voluntarily, and thus the important question is whether his absence can be considered a 'knowing' waiver. We hold that it can. The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly process of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried,' United States v. Tortora, supra, 464 F. 2d at 1208.

"Where the court finds that the defendant has voluntarily absented himself from the proceedings, it may decide to proceed in his absence only after balancing a 'complex of issues' including the additional burdens, waste and expense inflicted upon the court, government, witnesses, and co-defendants, and the public's interest in seeing the accused brought to trial as well as the court's responsibility to do so speedily. United States v. Tortora, supra; United States v. Peterson, supra. While the Sixth Amendment demands that courts give the utmost solicitude to the defendant's right to be present at each stage of trial it does not require the trial judge to accept at face value a defendant's claim of inability to appear in court, particularly where other defendants are involved, United States v. Tortora, supra, 464 F. 2d at 1210, and where the government has spent considerable time, energy and money in preparing for trial and assembling witnesses and a panel of veniremen in the expectation that trial will proceed as scheduled. Cf. United States v. Wilson, 421 U.S. 309, 318 94 S.Ct. 1802, 44 L.Ed. 2d 186 (1975).

"The decision as to whether the defendant's voluntary absence from the trial amounts to a waiver is thus vested in the sound discretion of the trial judge, who is usually in a superior position to evaluate the evidence, including witnesses' credibility, because of familiarity with the background and circumstances." 557 F. 2d at 9 (Emphasis supplied)

The question in any given case is whether under all the circumstances a waiver has occurred.

Here a waiver is clear. The record demonstrates that (a) petitioner knew a trial was in progress and (b) petitioner refused to attend that trial for reasons of his own.

Whether the record demonstrates that petitioner knew a trial was going on is a question of fact, just as in Tortora, supra and Pastor, supra. In Tortora, the defendant was not present for jury selection but nonetheless the facts indicated that he had notice of the trial. Id. at 1210. The same is true here.

Petitioner complains that the only information given to the court about his absence were "hearsay" reports from petitioner's lawyer and the prosecutor. This is an extraordinary argument. Since petitioner refused to come to court for reasons of his own for either the suppression hearing or the trial itself, it is difficult to comprehend how the trial court could obtain non-hearsay information about petitioner's absence. Was Justice Spector constitutionally obliged to leave the bench and visit petitioner in his holding cell?

Obviously a defendant who refuses to come to court necessarily makes it impossible to receive an on the record notice of beginning of trial. To the extent that petitioner is complaining that there was no on-the-record notice, his argument is pure Catch-22. To adopt such a proposition is to state that any defendant can forever postpone his trial by refusing to leave his cell. This is surely not the law.

Stated in another way, petitioner here purports sub silentio to have the right to come to court on such terms and conditions as he may dictate. Obviously petitioner has no such right. His misconduct may amount to a waiver. United States v. Toliver, 546 F. 2d 958 (2d Cir. 1976).

The only solution to the problems posed by petitioner would have been to forcibly drag petitioner to the courtroom in chains or shackles, and then formally advise petitioner on the record of his right to be present at his trial. This is a pointless formality when it is obvious that the defendant knows the case is proceeding to trial, with or without him.

There is no requirement in such a situation that the trial court personally advise the defendant of the consequences of missing the trial. The law is clear that a waiver of presence at trial may be implied from a defendant's conduct. Tortora, supra; Pastor, supra.

No doubt if petitioner had been forcibly compelled by shackles or otherwise to come to court for a formal waiver and/or to stand trial, petitioner would complain that other constitutional rights had been violated. Cf. Estelle v. Williams, 425 U.S. 501 (1976). Petitioner did, after all, indicate to his counsel that coming to court in handcuffs would violate his "constitutional rights." (A. 40). Petitioner believed in those purported rights strongly enough to refuse to come to court. Petitioner now takes the position that the

trial court should have forcibly compelled him to give up the rights he then so adamantly asserted.

Petitioner attaches much to the fact that he was not present for the empanelling and swearing of the jury. However the key issue is whether the waiver was valid, not at what stage it occurred. See United States v. Peterson, 524 F. 2d 167, 183-184 (4th Cir. 1975), Pastor, supra; Tortora, supra.

In Illinois v. Allen, supra, the Court said (at 343):

"We believe trial judges confronted with disruptive, contumacious defendants must be given sufficient discretion to meet the circumstance of each case."

While Allen concerned the behavior of a defendant in the courtroom, there is no reason not to apply the same principles to this case. So long as a defendant is aware that his trial is in progress or will begin, the trial court should be permitted sufficient discretion to handle the exigencies of each case. In this case, faced with a contumacious defendant who refused to come to court, Justice Spector chose not to compel his presence by force but to proceed without him. These were alternatives specifically approved by the Supreme Court in

Allen, supra, at 344.

In support of its holding in Allen, which declined to hold that the ejection of Allen from the courtroom was improper under the circumstances, the Supreme Court said (at 346):

"... our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on charges against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, thwarted, and obstructed by defendants brought before them charged with crimes."

The obstruction of justice which the Supreme Court refused to condone in Allen is exactly what petitioner is trying to get away with here.

The discretion of a trial judge to hold a trial in absentia is proper only when the public interest clearly outweighs that of the voluntarily absent defendant. Tortora, supra, at 1210. Here that discretion was properly exercised. It cannot be said as a matter of constitutional law that the public interest in having a system of justice which does not operate at the whim of defendants is outweighed by the interest of the voluntarily absent petitioner. In this connection there is no indication that petitioner would ever have agreed to come to court.

Petitioner's claim that as an in-custody defendant he could only waive his right to presence at trial by express consent on the record is without merit.

As noted above, this argument is Catch-22 since petitioner for reasons of his own refused to come to court. Hence no "express" waiver could have been put on the record. The only alternative was to bring petitioner in by use of force and/or to compel him to sacrifice other claimed constitutional rights.

Petitioner relies for his proposition* on Cross v. United States, 325 F. 2d 629 (D.C. Cir. 1963). The Circuit in Cross complained that the Government did not explain how a person in physical custody can "voluntarily absent" himself from the trial. This case provides that explanation. The court in Cross did not discuss the legal problems inherent in forcibly compelling an accused's attendance and said only that "an on the record statement in open court by the defendant himself should be required (325 F. 2d 629, 633, emphasis added). It is respectfully submitted that the proposition that a prisoner in custody is within the power of the State to produce is not viable. The proposition is too simplistic in that it fails to

*There is dictum in Diaz suggesting that this proposition is valid.

take into account the problem of what force, if any, may be used by the authorities to compel his attendance.

The Second Circuit in United States v. Crutcher, 405 F. 2d 239, 244 (2d Cir. 1968), cert. den. 394 U.S. 908 (1969), cited Cross only for the proposition that in the case of an in-custody defendant the "preferred practice" is to obtain an on-the-record waiver. Neither Cross nor Crutcher make a per se constitutional holding or requirement, nor do they suggest that all the surrounding circumstances may not be considered. Neither of these cases involve the situation in this case - a defendant deliberately refusing to emerge from his cell to go to the courtroom.

In any event, in Pastor, supra, the court found that a defendant's absconding constituted a waiver of his right to be present.

It is respectfully submitted that the more workable rule is that found in the opinion of Judge Wachtler in People v. Epps, 37 N Y 2d 343 (1975). Epps was a case where the defendant, along with other inmates, was boycotting the courts. Judge Wachtler speaking for a unanimous court wrote:

"The key issue is whether this defendant knowingly, voluntarily and intelligently relinquished this known right (Johnson v. Zerbst, 304 U.S. 458, 464). The appellant's most vigorous attack centers on the lack of voluntariness. He urges us to adopt a per se rule which would automatically preclude waiver where the accused is in custody. The basic reason being that in such a case the presence or absence of the accused is not within his control in contrast to the case of a defendant who is free on bail and flees the jurisdiction. In the latter instance the appellant agrees that a waiver may be inferred from the fact that the defendant is a fugitive from justice (see People v. Colombani, 22 A D 2d 956, affd. 16 N Y 2d 1055). However, he argues that once a defendant is refused bail the State controls his freedom and is obligated to produce him at trial.

While such an immutable rule is superficially appealing we think it goes too far. We prefer a more realistic approach, one which may be more readily applied in exceptional circumstances. Whenever there is a waiver by an incarcerated defendant it will be suspect and subjected to careful examination. If a judicial inquiry discloses the slightest hint of official connivance or obstruction with respect to the defendant's right to be present at his trial, that waiver will not be operative.

The instant case presents a much different situation. Here there was no official conspiracy to deprive this inmate of his right to be present and confront witnesses. Rather the defendant, along with other inmates, were consciously and actively

boycotting the courts. To permit such conduct to halt countless trials would set an extremely dangerous precedent and encourage future insurrections. In addition the right to a speedy trial would be jeopardized. The issue of voluntariness is a question of fact which should not be resolved by per se formulations. Here the trial court determined that the defendant had the opportunity to be present but failed to avail himself of the opportunity by his own volition. We see no reason to disturb that finding as a matter of law.

The appellant next takes aim at the 'knowing and intelligent' aspect of the waiver. Conceding arguendo that a defendant in custody is capable of waiving, he claims that it is incumbent on the court to have the accused brought before the court and at the very least state his waiver on the record. Again, we find such a rule overly rigid. We agree that such a procedure is preferable. However, we cannot ignore the context in which the instant waiver was effected. The record establishes that the appellant was counseled by the Trial Judge and his attorney that it would be in his best interest to attend his trial and the defendant promised to return. In addition, Epps was repeatedly advised by Department of Correction personnel pursuant to the direction of the court as to the nature of the proceedings against him and the consequences of his refusal to leave his cell. Surely this defendant knew and appreciated the impact of his joining the boycott.

To require, as the appellant urges, the court to send officers into the defendant's cell to bind and shackle him and deliver him by force merely to pronounce a pro forma waiver would not only have constituted an empty gesture but on these facts may well have precipitated a more serious disturbance. Moreover the responsibility in such a situation does not rest solely with the court. During the boycott a large percentage of those inmates scheduled to appear in court did in fact appear. It would seem absurd to allow this defendant to abort the trial merely by refusing to leave his cell. To condone this course of conduct, particularly where the defendant senses imminent conviction, would make a travesty of our criminal justice system."

Epps petition for habeas corpus on the same ground was denied in United States ex rel. Epps v. Smith, Dock. No. 76-C-187 (EDNY March 11, 1976) cert. of prob. cause den. (2d Cir., May 14, 1976) cert. den. __ U.S. __ (Oct. 11, 1976).

Clearly this petitioner was boycotting the courts just as did the defendant in Epps. The same principles apply.

Petitioner correctly points out that most of the cases finding valid waivers of presence at trial involve situations where defendants are at liberty or on bail. However, while this may be a factor to be considered, it is only

that. Obviously most waivers occur in such cases because it is in such cases that defendants are most able to disappear or flee. However it does not follow that a person in custody may not voluntarily refuse to attend his trial. People v. Epps, supra. All the surrounding circumstances must be considered.

Petitioner implies now that he did not want to proceed because he may have been communicating his dissatisfaction with his attorney. Yet this was petitioner's second lawyer. He had already fired his legal aid lawyer. Petitioner has never shown any cause no less good cause as to why his lawyer was unacceptable to him. He thus was required to accept assigned counsel. United States v. Calabro, 467 F. 2d 973 (2d Cir. 1972) cert. denied 410 U.S. 926 (1973); Davis v. Stevens, 326 F. Supp. 1182 (SDNY 1971). The trial court was not required to grant a continuance so that petitioner could have yet a third attorney. United States v. Abbamonte, 348 F. 2d 700 (2d Cir. 1965) cert. denied 382 U.S. 982 (1966). Petitioner had no absolute right to change counsel once the proceedings have begun or on the eve of the trial. United States v. Calabro, supra; United States ex rel. Robinson v. Fay, 348 F. 2d 705 (2d Cir. 1965) cert. denied 382 U.S. 997 (1966);

United States ex rel. Torry v. Rockefeller, 361 F. Supp. 422 (WDNY 1973). Nor did petitioner use his request for new counsel to delay the proceedings. United States v. Rosenthal, 470 F. 2d 837 (2d Cir. 1972) 412 U.S. 909 (1973); United States v. Calabro, *supra*; United States v. Morrissey, 461 F. 2d 666 (2d Cir. 1972); United States ex rel. Davis v. McMann, 386 F. 2d 611 (2d Cir. 1967) cert. denied 390 U.S. 958 (1968).

In hindsight, petitioner has presented a number of more "perfect" possibilities. Yet "[a] criminal trial is not an obstacle course for the judge." United States ex rel. Konigsberg v. Vincent, 526 F. 2d 131, 134 (2d Cir. 1975) cert. denied 426 U.S. 937 (1976). Judge Owen properly found that "a court cannot allow a defendant by disruption or evasive conduct to dictate the date or circumstances under which a trial will take place, particularly in this time of crowded metropolitan dockets and the difficulties of rescheduling police and law witnesses and keeping them available in the face of delays." (A. 18-19).

POINT II

THE STATE TRIAL COURT DID
NOT ERR IN FAILING TO ORDER
A COMPETENCY EXAMINATION
PRIOR TO TRIAL.

Petitioner argues that a competency examination should have been ordered to insure a valid waiver of presence at trial. This argument is without merit.

At the outset, this claim should be dismissed for failure to exhaust available state remedies. This argument was made in a single sentence in petitioner's Appellate Division brief.* The sentence occurred in discussion under a "POINT" heading which urged that petitioner's rights had been violated because he was tried in absentia. Not a single authority or case was cited to support the proposition. If this satisfied the exhaustion requirement, then the requirement may as well be dispensed with. Picard v. Connor, 404 U.S. 270 (1971).

*A copy is presented to the Court herewith.

Petitioner evidently claims his "irrational" religious beliefs and his "irrational" conduct at his most recent court appearance, and his counsel's request to have him examined were sufficient to require a competency examination as a matter of constitutional law.

Petitioner makes much of his counsel's request for an examination. However, it is clear that the relationship between the two was not the best; petitioner evidently had threatened Dreiband. This does not show mental incompetency. Moreover, petitioner concedes that his acquaintance with Dreiband was very brief. Defense counsel admitted that he never discussed the possibility of a psychiatric examination with the defendant, (A. 24) and even then his suggestion in court was a tentative one. The request was never renewed. Significantly it does not appear that at any prior time had defendant's counsel ever requested a psychiatric examination.

A trial court need order a competency examination only when there is sufficient evidence to raise a "bona fide" doubt as to petitioner's competency. Pate v. Robinson, 383 U.S. 375 (1966). "Sufficient evidence does not mean any unusual behavior. The law is clear that even where considerable evidence of prior mental stability exists a competency inquiry is not

necessarily required under Pate v. Robinson. See United States ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir. 1972) (no competency hearing required where petitioner had history of mental problems, but none in past seven years and three attorneys thought he was sane); United States ex rel. Rizzi v. Follette, 367 F. 2d 559 (2d Cir. 1966) (no competency hearing required where defendant had been discharged from mental institution twenty years earlier but was oblivious at one point in trial to what was going on); Jordan v. Wainwright, 457 F. 2d 338 (5th Cir. 1972) (no competency hearing required where counsel had "difficulty communicating with his client"); Hawks v. Pevton, 370 F. 2d 123 (4th Cir. 1966) (no competency hearing required where defendant of low mentality and could not remember circumstances of crime).

The evidence claimed by petitioner as requiring a competency examination is no more compelling than the evidence in the above cases. Certainly it pales in comparison to the facts in Pate v. Robinson, itself, facts which were held to require an examination. In Robinson, there was the uncontradicted testimony of four witnesses that Robinson had a long history of disturbed behavior which had extended from his childhood to within a year or so of his trial, and his

trial defense was based on his insanity. He had a long history of violence, including the killing of his infant son and an attempted suicide.

Faced with defendants lack of cooperation, which petitioner apparently chooses to call "irrational", the trial court evidently concluded that petitioner was deliberately stalling his final confrontation with the law. Such a conclusion certainly was a reasonable one under all the circumstances.

There appears to be some contemporaneous evidence as to petitioner's mental state at that time. According to the District Attorney,* a request was made for a neurological examination at Bellevue some two months after conviction. The request stated that the defendant had been non-psychotic until several weeks before the requested examination. However, a number of fights apparently had occurred causing petitioner confusion or head injuries. A psychiatric report

*District Attorney's Brief to the Appellate Division, provided to the court herewith, pp. 12-13. The District Attorney advises respondents' attorney that these records are not in their file. Referral was made to a court file, which contains the court order of the examination dated February 22, 1973. The result of the examination is not in the file, but endorsed on the jacket are these words: "See Psychiatric Report Filed March 7, 1973 'Not Incapacitated.'"

was ordered and the defendant was found "Not Incapacitated". The information in petitioner's pre-sentence report as described by to the Court below (Brief, p. 28) does not contradict this conclusion and do not raise any inference of mental incompetency.

Petitioner appears to suggest that in addition to a competency hearing on the ability to stand trial, he was entitled to an additional hearing on his competency to waive his right to be present at trial. Petitioner also claims that one competence standard is higher than the other. Petitioner cites as authority Westbrook v. Arizona, 384 U.S. 150 (1966).

Petitioner is incorrect when he claims that the standard to be utilized in evaluating a defendants' competency to waive a fundamental trial right is "lower than the threshold" to be utilized in determining his competency to stand trial. Westbrook v. Arizona, supra, relied on by petitioner, states no such proposition and states no such standard. Westbrook simply states that where a defendant had been found competent to stand trial after a pre-trial competency hearing, a further hearing or inquiry to determine

competency to waive counsel must be held where defendant chooses to proceed pro se. In this case, petitioner's competence was never even put in issue (by way of competency examination) in the first place.

The Supreme Court never indicated how Westbrook's second competency hearing or inquiry was to differ from the first. If the Supreme Court had intended to announce a new standard in Westbrook, it would surely have announced what that standard was. On the basis of Westbrook, therefore, it is impossible to presume a new or different competency standard for the waiver of a fundamental trial right.

Petitioner in effect has invited this Court to adopt the position taken by the Ninth Circuit in Sieling v. Eyman, 478 F. 2d 211 (9th Cir. 1973), namely that the standard for competence to "make decisions of very serious import" is higher than the standard of competence to stand trial. That invitation should for sound reasons be rejected.

Petitioner gives no indication as to how, as a practical matter, this new competence standard is to differ from the present standard of competence, except that the

"threshold" is "lower" for the waiver issue. Fine differences in levels and degrees of competence, however, may not even be scientifically ascertainable. The uncertainties and tentativeness of psychiatric judgments, a problem long recognized by the Supreme Court, Greenwood v. United States, 350 U.S. 366, 375 (1956), already presents sufficient difficulties without the necessity of compounding them by adding new degrees or competence.*

It is significant that petitioner nowhere indicates why the present mental competence standard is insufficient to determine competence to waive a fundamental trial right such as the right to be present at trial. Petitioner apparently assumes that a person who stands trial faces no decisions of very serious import whereas a person who waives a fundamental trial right faces such decisions. The assumption is not justified. A defendant who is competent to stand trial must take numerous serious decisions, such as whether to go to trial at all, and if so, whether to take the stand. In fact, there is no real basis for supposing

*See generally Note, Incompetency to Stand Trial, 81 Harvard Law Review, 454, 459 (1967).

that a defendant with the mental competence to stand trial does not also possess the mental competence to waive his right to be present at trial.

Petitioner misreads Saddler v. United States, 531 F. 2d 83 (2d Cir. 1976), when he claims it adopted the holding of Sieling v. Eyman, supra requiring a higher standard of competency to plead guilty or waive certain constitutional rights than to stand trial. In Saddler, the Court remanded for a competency hearing pursuant to 18 U.S.C. § 4244, which is a proceeding to determine competence to stand trial. It would be anomalous indeed, if the Court expected that a finding of whether the defendant was able to understand the proceedings against him and assist in his defense would necessarily include a finding about some undefined higher competence.

Equating the standard for competency to stand trial with the level required for pleading guilty has been almost uniformly and historically accepted as the applicable law. Note, Competence to Plead Guilty: A New Standard, 74 Duke Law Journal 149, 155; Dusky v. United States, 362 U.S. 402 (1960); Criminal Procedure Law § 703.10; former Code of Criminal Procedure § 662; United States v. Mercado, 469 F. 2d 1148 (2d Cir. 1972); United States v. Valentino, 283 F. 2d 634 (2d Cir. 1960).

In sum, this Court should reject the Ninth Circuit's approach. Other Circuits have already rejected it. Malinauskas v. Hewitt, 505 F. 2d 649 (5th Cir. 1974); United States v. Bettenhausen, 499 F. 2d 1223 (10th Cir. 1974); United States v. Harlan, 480 F. 2d 515 (6th Cir. 1973). The Ninth Circuit's approach has been sharply and persuasively criticized. Note, Competence to Plead Guilty: A New Standard, 1974, Duke Law Journal 149. United States ex rel. McGough v. Hewitt, 528 F. 2d 339, 342 (3rd Cir. 1975).*

The Court below properly found that no hearing on petitioner's mental competence was required (A. 5).

*The Second Circuit was invited to adopt this standard in United States ex rel. Putmon v. Henderson, 525 F. 2d 683 (2d Cir. 1975) but did not reach the issue. In United States ex rel. Koenigsberg v. Vincent, *supra*, the court thought that Westbrook indicates "vaguely" that one standard is higher than the other.

CONCLUSION

THE ORDER OF THE COURT BELOW
SHOULD BE AFFIRMED IN ALL
RESPECTS.

Dated: New York, New York
October 18, 1977

Respectfully submitted,

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